(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Medzam, Ltd.	)	FIFRA Appeal No. 91-1
Docket No. IF&R II-470-C	)	

[Decided July 20, 1992]

FINAL DECISION

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

MEDZAM, LTD.

FIFRA Appeal No. 91-1

FINAL DECISION

Decided July 20, 1992

Syllabus

The Respondent in this action has appealed from the issuance to it of a Default Order under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Respondent contends that it was not properly served with the Complaint. It asserts that the Complaint was not properly "directed" under 40 CFR §22.05(b)(1)(ii) because the acknowledgement of receipt of the Complaint was signed by a bookkeeper, rather than an officer, partner, or managing agent of the company. Respondent also challenges the determination that its product is a pesticide and thus subject to FIFRA and contends that its actions were not violations of FIFRA.

Held: To be properly directed under §22.05(b)(1)(ii), a Complaint must be addressed and mailed to a person within one of the classes of persons specified therein. If it is properly addressed and mailed, and the return receipt signed, it is valid without regard to which of Respondent's employees signed the receipt on behalf of the Respondent. In this instance, the Complaint was addressed and mailed to the Respondent without being further directed to any person within any of the classes listed in §22.05(b)(1)(ii). Therefore, service of the Complaint was not properly directed to the Respondent, and thus is invalid. Accordingly, the Default Order is vacated and the Complaint dismissed.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

Respondent, Medzam, Ltd., has appealed the issuance to it of a Default Order under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. §136 *et seq.* (FIFRA). The order was issued on July 30, 1991, by Constantine Sidamon-Eristoff, the Regional Administrator of the U.S. Environmental Protection Agency's Region II. The order assesses a $3,500 penalty for alleged violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §136j(a)(1)(A), arising from the distribution or sale of an unregistered pesticide, Red-Z, at Respondent's store in North Tonawanda, N.Y. on March 22, 1989.

The order issued by the Regional Administrator constitutes an initial decision of the Agency, pursuant to 40 CFR §22.17(b). Initial decisions may be appealed to the Environmental Appeals Board pursuant to 40 CFR §22.30 (57 Fed. Reg. 5325, February 13, 1992). This appeal has been taken under that provision.

I. *Background*

The basic facts of this case do not appear to be in dispute.[1] On March 22, 1989, an inspector from the New York State Department of Environmental Conservation collected a sample of Respondent's product, Red-Z, from the stock that Respondent held for sale or distribution at its North Tonawanda store. The product sample bore a label that stated in part, "Sanitizer Deodorizer Red-Z is a unique fast acting encapsulator with stabilized chlorine available at 10,000 ppm. The application of a chlorine compound is consistently recommended for use on spilled body fluids. Aggressively attacks: AIDS, Hepatitis and any other blood bourne [sic] virus."

Red-Z is not registered as a pesticide with EPA. As will be discussed later, Respondent asserts that Red-Z is not a pesticide and thus is exempt from registration under FIFRA.

Region II's Director, Environmental Services Division, having determined that Red-Z was subject to the registration requirement, issued a Complaint to Respondent on September 27, 1990, alleging that Respondent violated FIFRA by distributing or selling an unregistered pesticide. In the Complaint, Region II proposed a civil penalty of $3,500, calculated in accordance with the EPA Enforcement Response Policy for FIFRA issued on July 2, 1990. The Complaint advised Respondent of its right to a hearing pursuant to Section 14(a) of FIFRA, 7 U.S.C. §136 *l*(a)(3) and 40 CFR Part 22. The Complaint further provided that to avoid being found in default, an Answer had to be filed within twenty days after service of the Complaint, which Answer may include a request for a hearing. The Complaint outlined the consequences of failure to respond as follows:

> Failure to admit, deny, or explain any of the factual allegations in the Complaint will be deemed to constitute an admission of the allegations. Failure to file a written Answer within twenty (20) days of receipt of this Complaint will be deemed to represent Respondent's admission of all facts alleged in the Complaint and a waiver of its right to contest such facts. In such event, a Final Order of Default will be issued by the Regional Administrator, and the civil penalty proposed herein will be imposed without further proceedings.

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[1] Moreover, if a default is determined to have occurred, 40 CFR §22.17 provides that such default constitutes an admission of all facts alleged in the complaint.

Complaint at 3.

The Complaint was mailed on September 27, 1990, via certified mail. Region II received a return receipt for the Complaint stamped October 1, 1990, and bearing the signature of "Kathleen Moreland" as signing for Respondent. Respondent admits that it did not file an Answer to the Complaint prior to the expiration of the 20 days. However, Respondent contests the validity of the service of the Complaint.

On May 30, 1991, Complainant filed a Motion for Default Order with the Region II Regional Administrator pursuant to 40 CFR §§22.16 and 22.17. A copy of the Motion was served on Respondent pursuant to 40 CFR §22.17(a) and was received on June 5, 1991. Respondent filed a timely response on June 10, 1991, entitled "Respondent's Answer and Affirmative Defenses." Complainant then entered into negotiations with Respondent which were unsuccessful. The Regional Administrator issued the Default Order on July 30, 1991. The final order, while noting the receipt of Respondent's reply in the *Preliminary Statement* section, was virtually identical to the proposed order included with the Motion for Default Order. Respondent then appealed.

Respondent's appeal raises both procedural and substantive issues. Respondent asserts that the Complaint was not properly served because it was not "directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process." (40 CFR §22.05(b)(1)(ii)). Respondent states that Kathleen Moreland, a bookkeeper, was not authorized to receive service. In fact, Respondent characterizes Ms. Moreland as a "disgruntled employee" who was terminated on or about the October 1, 1990, date listed on the return receipt. The Respondent-Appellant's Brief on Appeal and Motion to Set Aside, on page 3, refers back to the discussion of this issue in its June 10, 1991, "Answer". In that document, Respondent states:

> 19. At no time was Kathleen Moreland an employee of respondent authorized to accept service of process or complaints, nor was she a "managing agent" or person of authority of respondent.
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> 20. Kathleen Moreland was employed by respondent as a bookkeeper, but was fired for incompetency on or about October 1, 1990. At all times herein material, after being terminated, Kathleen Moreland was angry and resentful and did

> certain physical damage and engaged in certain physical damage and acts of retribution in respondent's offices.
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> 21. At no time did Kathleen Moreland turn over to respondent or any of its officers or employees a copy of the complaint which she allegedly received on or about October 1, 1990.
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> 22. Respondent does not believe that said complaint was served on Kathleen Moreland on October 1, 1990, but rather, on a later date and that she falsified or altered the date of receipt in anger and retribution.

Respondent's Answer and Affirmative Defenses (June 10, 1991) at 5.

Respondent contends that due to the allegedly defective service of the Complaint, its first notice of this proceeding was on June 5, 1991, when it received a copy of the Motion for Default Order and thus its Answer on June 10 was timely and the Default Order should not have been issued.

Respondent further challenges whether Red-Z is in fact a pesticide within the meaning of 7 U.S.C. §136. Respondent describes its product as follows:

> Respondent's product is essentially an encapsulation product which performs a mechanical encapsulating function on liquids, i.e., it solidifies liquids.
>
> The presence of an extremely low level (less than 1%) of available chlorine is incidental to the encapsulating function, and is far less than the 2% minimum. Respondent's Red-Z product resembles a host of off-the-shelf household and commercial cleaning and encapsulating products which *are not* deemed to be pesticides by the Administrator and are not registered as such. Furthermore, Respondent's Red-Z product did not make any relevant disinfectant or anti-microbial claims. (Emphasis in original.)

Respondent-Appellant's Brief On Appeal and Motion to Set Aside at 6.

In Respondent's Answer and Affirmative Defenses at page 3, Respondent elaborates by indicating that at all times its product had an available chlorine concentration of less than 1% of the product or less than 10,000 ppm. It states, upon information and belief, that products such as Red-Z are exempt from being registered or covered by FIFRA unless they have in excess of 60% available chlorine or 600,000 ppm.

Respondent also asserts that Complainant "both by direct advice as well as by its brochures and publications" had previously advised Respondent that Red-Z was exempt from FIFRA and need not be registered. Respondent-Appellant's Brief on Appeal and Motion to Set Aside at 4. Therefore, Respondent believes Complainant was barred by laches, acquiescence and estoppel.

The Complainant filed a Reply Brief on September 10, 1991. In its Reply Brief, Complainant denies that its service of the Complaint was in any way defective. It indicates that the Complaint was addressed to the Respondent and mailed to Respondent by certified mail, return receipt requested, in accordance with the applicable rule, 40 CFR §22.05(b)(1)(i). Service was made on a representative of the Respondent. "According to the Respondent's own papers, the real problem lay with its employee, who was apparently authorized to receive mail and to whom the U.S. Postal Service actually delivered the mail." Reply Brief at 7. In the Region's view, acceptance of the envelope satisfied Complainant's obligation; the conduct of the employee receiving the envelope is Respondent's responsibility.

Complainant, in its Reply Brief, also addresses the other issues raised in the appeal. On the issue of the applicability of FIFRA, Complainant cites Section 2(u) of FIFRA, 7 U.S.C. §136(u) as defining a pesticide to include "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest * * *." As provided in 40 CFR §152.15, a substance is considered to be intended for pesticidal purposes, and thus subject to registration, if:

> (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):
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> (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or
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> (2) That the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide; or
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> (b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as

> distributed or sold other than (1) use for pesticidal purpose (by itself for in combination with any other substance), (2) use for manufacture of a pesticide; or
> (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

Complainant asserts that the viruses mentioned on the Red-Z label meet the definition of a pest, and thus Red-Z is subject to registration based on its labeling claims and Respondent's actual or constructive knowledge of its intended use, irrespective of the "extremely low level" of available chlorine.

Finally, Complainant states that neither the appeal nor the Answer provide sufficient facts to establish that EPA represented to Respondent that Red-Z need not be registered. In any event, even if such representations were made, Complainant states that a party assumes the risk when it relies on an interpretation of an agency rule provided by an agency employee and that opening the door for violators to claim that their violations result from incorrect advice from unidentified Agency employees would invite endless litigation.

II. *Discussion*

The threshold determination is the validity of the service of process, since if service were defective, it would vitiate all of the subsequent proceedings. The essence of Respondent's challenge is that the service was not properly "directed" within the meaning of 40 CFR §22.05(b)(1)(ii).

There is no clarification in the rules or the preamble accompanying it [2] as to the meaning of the word "directed." We recognize that the term "directed" in this context is different from the term "delivered" as used in other parts of §22.05(b). Delivery, which contemplates personal service, is much more within the control of the Complainant. When serving a complaint by mail, Complainant has control over how the mail is addressed but none whatsoever over who receives and signs for it on behalf of the Respondent. The rule does not contain acknowledgement-of-

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[2] The Consolidated Rules of Practice, comprising 40 CFR Part 22, were adopted as a final regulation on April 9, 1980 (45 Fed. Reg. 24363 et seq.). They were proposed (43 Fed. Reg. 34378 et seq.), and adopted on an interim basis (43 Fed. Reg. 34730 et seq.), on August 4, 1978.

service requirements comparable to the Federal rule, [3] only a return receipt requirement for certified mail. For service of the Complaint by mail, 40 CFR §22.07(c) provides that service is complete when the return receipt is signed. We think the proper focus of our inquiry in determining the effectiveness of service under §22.05(b) is therefore on whether the Complaint was properly addressed and mailed and whether the return receipt was signed by an employee of the Respondent, rather than on the authority of the employee who signed the receipt on behalf of the Respondent. [4]

We have looked to the record on appeal to ascertain whether all of the required elements of proper service have been complied with. Once Respondent's Answer raised the issue of validity of service, the Complainant had the obligation to assure that the administrative record demonstrated that service was proper. We can fairly assume that any document material to this issue would have been included in the record as submitted to the Regional Administrator accompanying the final Default Order.

As previously discussed, a threshold question, then, is how the envelope was addressed. The record does not contain a copy of the envelope nor a copy of a transmittal letter if there was one. There are two significant documents in the record relating to service, however. These are the return receipt for certified mail and the certificate of service. The return receipt shows the article as being addressed to "MEDZAM LTD." It does not indicate the name of any particular person. The Certificate of Service also lists only the company name. We can only infer from this that the Complaint was mailed to Medzam, Ltd., without being further addressed to an officer or agent. We note that Complainant's Reply Brief says that it was addressed to "the Respondent." (Reply Brief at p. 6.)

Since the Complaint was mailed addressed only to "Medzam, Ltd." without further addressing it to one of the persons specified in §22.05(b)(1)(ii), it was not properly "directed" under that section and

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[3] Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

[4] In a case somewhat similar to this one, *In re Katzson Brothers, Inc.*, FIFRA Appeal No. 85-2 (Final Decision November 15, 1985) (Order on Reconsideration March 3, 1986), service of a complaint by certified mail addressed to the owner and president of a company, signed for by that person's secretary, was found to be valid despite allegations by the owner of lack of actual notice due to acts of "sabotage" by the secretary. On appeal, the Court of Appeals for the Tenth Circuit upheld this determination, although the Order was reversed and remanded on other grounds. *Katzson Bros., Inc. v. United States Environmental Protection Agency*, 839 F.2d 1396 (10th Cir. 1988).

service was defective. Accordingly, the Default Order is hereby vacated and the Complaint dismissed.

So ordered.